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A SANTAMIL SELVI ALAU MALAY & ORS v. DATO' SERI MOHD NAJIB TUN ABDUL RAZAK & ORS

HIGH COURT MALAYA, KUALA LUMPUR
HASNAH MOHAMMED HASHIM J
[CIVIL SUIT NO: 22NCVC-281-06-2014]
21 JANUARY 2015

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CIVIL PROCEDURE: *Locus standi – Action by wife on behalf of estate of deceased – Whether Letter of Administration granted – Whether wife was executor or administrator of estate of deceased – Whether locus to protect and preserve interest of estate of deceased must be shown – Whether special circumstances shown – Whether writ a nullity*

C

CIVIL PROCEDURE: *Striking out – Writ and statement of claim – Allegation of conspiracy – Whether clearly pleaded – Whether bare allegations – Whether essential elements for tort of conspiracy pleaded – Whether failure to particularise cause of action fatal to plaintiffs' case – Whether scandalous, frivolous and vexatious – Whether an abuse of court process – Rules of Court 2012, O. 18 r. 19(1)(a), (b), (c) & (d)*

D

CIVIL PROCEDURE: *Affidavit – Contents – Whether affidavit must contain facts that deponent is able to prove based on own knowledge – Whether plaintiffs' affidavit contained facts and beliefs – Whether failure to disclose source of information rendered statements in affidavit hearsay – Whether plaintiffs had direct or actual knowledge of matters deposed in affidavit*

E

TORT: *Conspiracy – Elements – Whether essential elements for tort of conspiracy pleaded – Whether predominant intent to injure and/or to cause loss by unlawful means pleaded – Whether agreement or particulars of agreement pleaded – Whether bare allegations frivolous and vexatious*

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On or about 3 July 2008, one Balasubramaniam a/l Perumal ('the deceased') held a press conference where he made a statutory declaration ('SD1') setting out certain facts relating to the on-going murder trial of one Altantuya Shaaribuu to which he alleged that he was privy. At all material times, the deceased was a private investigator hired by one of the accused in the murder trial, Razak Baginda ('Razak') and his family. It was alleged that through the observation of the deceased and as was told to him by Razak and Altantuya, he became aware of matters involving various personalities. The deceased released SD1 as he was purportedly concerned that the prosecution team in the murder trial appeared to have been avoiding certain crucial evidence that the deceased had revealed to the police. Subsequently, on 4 July 2008, another press conference was called where the deceased released another statutory declaration ('SD2') in which the deceased retracted the entire contents of SD1 on the grounds that he had been compelled to affirm SD1 under duress. It was alleged that arrangements were made by the eighth defendant to subsequently transport the deceased together with his family to Chennai through Singapore, Bangkok, Kathmandu, New Delhi and Madurai

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where the deceased and his family lived until his demise on 15 March 2013. Hence, the first plaintiff, the lawful widow and representative of the estate of the deceased, sued in her personal capacity and on behalf of the estate. The second, third and fourth plaintiffs were the lawful children of the first plaintiff and the deceased. It was the plaintiffs' pleaded claim that the defendants had acted together in cohorts and/or individually, in complicity with each other, unlawfully and/or by unlawful means and with malice, to cause loss and damage to the deceased and the plaintiffs. The plaintiffs' amended statement of claim ('SOC') contained statements alleging that there was a massive and concerted effort between all the defendants to ensure that the contents of SD1 were completely retracted and substituted with SD2 and once that was achieved, the deceased had to be removed from the jurisdiction by threat and inducement. It was also stated that there were intimate connections between the defendants and the roles each played in the purported conspiracy. The defendants filed striking out applications, in encls. 17, 19, 21, 23, 25, 29, 30 and 33, under O. 18 r. 19(1)(a), (b), (c) and (d) of the Rules of Court 2012 and/or under the inherent jurisdiction of the court for orders to strike out the plaintiffs' writ and SOC. The common grounds raised by the defendants were, *inter alia*: (i) the amended SOC did not disclose a reasonable cause of action; (ii) it was scandalous, frivolous and vexatious; (iii) it was an abuse of the process of the court; (iv) the plaintiffs had not pleaded any unlawful act committed by the defendants; and (v) the first plaintiff did not have the *locus standi* to bring the action.

Held (allowing defendants' applications in encls. 17, 19, 21, 23, 25, 29, 30 and 33; striking out plaintiffs' writ and amended SOC):

(1) No action may be commenced by the plaintiffs until the Letters of Administration are granted. The first plaintiff herein had not been issued with the Letter of Administration and neither was she the executor nor the administratrix of the estate of the deceased. The courts will not ordinarily grant *locus* unless it can be shown that it was necessary and expedient to protect and preserve the interest of the estate of the deceased (*Al Rashidy Kassim & Ors v. Rosman Roslan*, foll). Further, the fact that the cause of action would expire could not qualify it to be treated as a special circumstance. (paras 40, 42, 44 & 46)

(2) The relief sought by the plaintiffs was for general damages which would clearly not qualify to be treated as special circumstances. There were also no special circumstances for any exception to be made on the facts of this case nor was on the relief sought by the plaintiffs in this action for 'declaration' to 'protect or preserve the assets' of the estate. It was thus abundantly clear that the first plaintiff did not have the capacity to initiate the action against all the defendants. The writ must therefore be regarded as a nullity from the very beginning. (para 49)

(3) The second, third and fourth plaintiffs' pleaded case was not for a claim for loss of support pursuant to s. 7(1) of the Civil Law Act 1956. As such the second, third and fourth plaintiffs did not have the *locus standi* to maintain the action. Due to the plaintiffs' lack of *locus standi*, the case was 'obviously unsustainable', and clearly a plain and obvious case to be struck out against all the defendants. (paras 50 & 104)

(4) In order to sustain a claim against the defendants for conspiracy, the plaintiffs must plead the essential elements for a tort of conspiracy. However, the statements in the amended SOC were mere general allegations. The plaintiffs had failed to plead the material particulars and had also failed to particularise with clarity as to the purported conspiracy pleaded. There was neither a predominant intent on the part of all the defendants to injure the deceased and/or to cause loss by unlawful means. The plaintiffs' failure to plead any agreement or the particulars of the agreement and failure to plead, with clarity, the alleged overt acts of the first and second defendants in committing the alleged conspiracy in pursuance of their agreement proved fatal to the allegation. (paras 52, 68 & 69)

(5) The plaintiffs had not expressly pleaded the third defendant's involvement in any of the unlawful acts. In order to prove conspiracy, the very first element to be shown is an agreement between two or more persons for the purpose of injuring the deceased. However, the plaintiffs had failed to plead the material particulars of the agreement and to plead with clarity of the alleged overt acts of the third defendant in committing the alleged conspiracy in pursuance to the agreement. (paras 73, 74 & 75)

(6) The affidavits must contain facts that the deponent is able to prove based on her own knowledge. The averments stated in the first plaintiff's affidavit against the fourth defendant contained facts and beliefs. The first plaintiff had failed to disclose the source of information with regards to the statements. In the circumstances, the facts in the first plaintiff's affidavit tantamount to merely hearsay and hence, ought to be rejected by the court. (paras 78 & 79)

(7) The unlawful acts allegedly carried out by the fifth and sixth defendants were not pleaded. Neither did the plaintiffs plead that the fifth and sixth defendants had coerced or in any form forced the deceased to affirm SD2. Further, the plaintiffs, in particular the first plaintiff, did not have direct or actual knowledge of the matters deposed in the affidavit. (paras 85 & 86)

(8) A perusal of the plaintiffs' amended SOC clearly showed that the plaintiffs had failed to particularise the purported cause of action premised on the tort of conspiracy against the seventh defendant. The plaintiffs had merely made statement and general allegations of conspiracy without alluding to particulars. Further, the plaintiffs' cause

of action against the ninth defendant was also entirely without any particulars which resulted in the plaintiffs having no cause of action as pleaded against the ninth defendant. (paras 88 & 97)

(9) In the tortuous act of conspiracy, there must be an agreement or a combination of two or more with the common intention to effect an unlawful purpose or to do a lawful act by unlawful means which will result in damages to the plaintiffs. The allegations of conspiracy were serious and grave. The standard of proof is high and must commensurate with the severity of the charge. Allegations of such an act of conspiracy must be clearly pleaded and the overt acts must not be disjointed. Therefore, the bare allegations of conspiracy against the defendants as pleaded by the plaintiffs were clearly frivolous and vexatious. (paras 100 & 101)

Case(s) referred to:

Adib Mokhtar & Ors v. Jason Chan Chee Khong & Anor [1999] 5 CLJ 555 HC ***(refd)***
Al Rashidy Kassim & Ors v. Rosman Roslan [2007] 3 CLJ 361 FC ***(foll)***
AmInvestment Bank Bhd v. NEP Holdings (Malaysia) Bhd [2013] 1 LNS 348 HC ***(refd)***
Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***
Belmont Finance v. Williams Furniture (No. 2) [1980] 1 All ER 393 ***(refd)***
Celcom (Malaysia) Bhd v. Mohd Shuaib Ishak [2010] 7 CLJ 808 CA ***(refd)***
Crofter Hand Woven Harris Tweed Co Ltd v. Veitch [1942] AC 435 ***(refd)***
Dato' Ramesh Rajaratnam v. Datin Zaleha Abd Rahman & Ors [2014] 5 CLJ 669 CA ***(refd)***
Deraman & Ors v. Mek Yam [1976] 1 LNS 20 FC ***(refd)***
Hua Joo Development Co Sdn Bhd v. Survey Development Service [1994] 1 CLJ 73 HC ***(refd)***
Industrial Concrete Products Bhd v. Concrete Engineering Products Bhd & Other Suits [2001] 8 CLJ 262 HC ***(refd)***
Ingall v. Moran [1944] KB 160 ***(refd)***
Lonrho Plc v. Fayed and Others [1991] 3 All ER 303 ***(refd)***
Meyappa Chetty v. Subramaniam Chetty [1916] AC 603 ***(refd)***
Mulcahy v. R [1868] LR 3 HL 306 ***(refd)***
Omar Ali Mohd & Ors v. Syed Jafaralsadeg Abdulkadir Alhadad & Ors [1995] 3 SLR 388 ***(refd)***
Pet Far Eastern (M) Sdn Bhd v. Tay Young Huat & Ors [1999] 2 CLJ 886 HC ***(refd)***
Renault SA v. Inokom Corporation Sdn Bhd & Anor and other applications [2010] 5 CLJ 32 CA ***(refd)***
Rookes v. Barnard [1964] 1 All ER 367 ***(refd)***
Wong Moy v. Soo Ah Choy [1996] 3 SLR 398 ***(refd)***
Yap JH v. Tan Sri Loh Boon Siew & Ors [1991] 3 CLJ 2960; [1991] 4 CLJ (Rep) 243 HC ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 7(1)
Rules of Court 2012, O. 6 r. 2(1)(b), O. 18 r. 19(1)(a), (b), (c), (d), O. 41 r. 5(1)

Other source(s) referred to:

Bullen & Leake & Jacob's Precedents of Pleadings, 13th edn, p 221

A *For the plaintiffs/appellants - Americk Sidhu; M/s Americk Sidhu*
For the 1st & 2nd defendants - Mohd Hafarizam Harun (Nazeera Hanifa with him); M/s Hafarizam Wan & Aisha Mubarak
For the 3rd defendant - Dhinesh Bhaskaran (Denise Tan with him); M/s Shearn Delamore & Co
For the 4th defendant - B Thangaraj; M/s Thangaraj & Assocs
B *For the 5th and 6th defendants - Darryl Goon (Rishwant Singh & Maidzuara with him); M/s Zul Rafique & Partners*
For the 7th defendant - Satha; M/s Satha & Co
For the 8th defendant - Gabriel Daniel; M/s Paul Ong & Assocs
For the 9th defendant - Chong Ian Shin; M/s Arulampalam & Co

C *Reported by S Barathi*

JUDGMENT

Hasnah Mohammed Hashim J:

D **[1]** There are eight striking out applications before me premised on O. 18 r. 19(1)(b) and/or (d) of the Rules of Court 2012 and/or under the inherent jurisdiction of the court, for orders to strike out the respondents'/plaintiffs' writ and statement of claim ("SOC") on the grounds that it did not disclose a reasonable cause of action, scandalous, frivolous and vexatious
E and/or an abuse of the process of the court.

[2] The applications are as follows:

[3] Enclosure 17 is the application dated 4 August 2014 by the first and second defendants pursuant to O. 18 r. 19(1)(a) or (b) and (d) of the Rules of Court 2012 (ROC) for an order to strike out the plaintiffs' writ and
F statement of claim ("SOC"). The application is supported by the affidavit affirmed by Dato' Seri Mohd Najib bin Tun Abdul Razak on 4 August 2014.

For the purpose of the hearing of encl. 17, the following documents were considered by this court:

G (i) Amended writ and statement of claim dated 23 June 2014 (encl. 9 and 10);

(ii) The first and second defendants' application under O. 18 r. 19 of the ROC dated 4 August 2014 (encl. 17);

H (iii) The first and second defendants' affidavit in support of encl. 17 by Dato' Sri Mohd Najib bin Tun Abdul Razak affirmed on 4 August 2014 (encl. 18);

(iv) Plaintiffs' affidavit in reply affirmed on 10 September 2014 (encl. 37);

I (v) The first and second defendants, affidavit in reply affirmed on 25 September 2014 (encl. 40); and

(vi) The affidavit affirmed by Chia Keng Hock affirmed on 8 October 2014 (encl. 45).

The grounds of the application:

(i) The said amended SOC discloses no cause of action against first and second defendants; or

(ii) It is scandalous, frivolous and vexatious; and

(iii) Abuse of the process of the court.

[4] Enclosure 21 is the application dated 5 August 2014 by the third defendant pursuant to O. 18 r. 19(1)(a) or (b) and/or (d) of the Rules of Court 2012 (ROC) for an order to strike out the plaintiffs' writ and statement of claim ("SOC"). The application is supported by the affidavit affirmed by Ahmad Johari bin Abdul Razak on 4 August 2014 (encl. 22).

The grounds of the application:

(i) The plaintiffs have not pleaded any unlawful act committed by the third defendant;

(ii) No link between the single pleaded act of the third defendant and the alleged damage; and

(iii) The first plaintiff does not have *locus standi* to bring this action.

[5] Enclosure 19 is the application dated 5 August 2014 by the fourth defendant pursuant to O. 18 r. 19(1)(a), (b), (c) and (d) of the ROC for an order to strike out the plaintiffs' writ and statement of claim ("SOC"). The application is supported by the affidavit affirmed by Dato' Mohd Nazim bin Tun Abdul Razak on 5 August 2014 (encl. 20).

The grounds of the application:

(i) The plaintiffs have not pleaded any unlawful act committed by the third defendant.

(ii) No link between the single pleaded act of the third defendant and the alleged damage.

(iii) The first plaintiff does not have *locus standi* to bring this action.

[6] Enclosure 23 is the application dated 5 August 2014 by the fifth and sixth defendants pursuant to O. 18 r. 19(1)(a), (b), (c) and (d) of the ROC for an order to strike out the plaintiffs' writ and amended SOC. The application is supported by the affidavit affirmed by Tan Sri Cecil Wilbert Mohanaraj Abraham and Sunil Abraham on 1 August 2014 (encl. 24).

[7] Enclosure 25 is the application dated 5 August 2014 by the seventh defendant pursuant to O. 18 r. 19(1)(a), (b), (c) and (d) of the ROC for an order to strike out the plaintiffs' writ and amended SOC. The application is supported by the affidavit affirmed by Zainal Abidin bin Muhayat on 5 August 2014 (encl. 26).

[8] Enclosure 33 is the application dated 20 August 2014 by the eighth defendant pursuant to O. 18 r. 19(1)(a), (b), (c) and (d) of the ROC for an order to strike out the plaintiffs' writ and amended SOC. The application is supported by the affidavit affirmed by Deepak Jaikishen a/l Jaikishan Rewachand on 20 August 2014 (encl. 34).

[9] Enclosures 29 and 30 is the application dated 5 August 2014 by the ninth defendant pursuant to O. 18 r. 19(1)(a), (b), (c) and (d) of the ROC for an order to strike out the plaintiffs' writ and amended SOC. The application is supported by the affidavit affirmed by Arulampalam a/l Mariampillai on 5 August 2014 (encl. 31).

The Parties

[10] The first plaintiff is the lawful widow and representative of the estate of Balasubramaniam a/l Perumal (the deceased) and is suing in her personal capacity. The second, third and fourth plaintiffs are infants and the first plaintiff's lawful children with the deceased. The first plaintiff purports to bring this action on behalf of the estate of the deceased and in her personal capacity.

[11] The first defendant is the Prime Minister of Malaysia and the second defendant is the wife of the first defendant. The third defendant is the younger brother of the first defendant and an advocate & solicitor practising with the firm of Shearn Delamore & Co at that material time. The fourth defendant is also the younger brother of the first defendant and is an architect by profession.

[12] The fifth and sixth defendants were at all material time partners in the firm of Zul Rafique & Partners. The seventh defendant is and was at all material time, a registered Commissioner for Oaths. The eighth defendant is and was a businessman at that material time. The ninth defendant is and was at all material time an advocate & solicitor practising under the name Arulampalam & Co.

Background

[13] On or about the 3 July 2008, the deceased held a press conference at the headquarters of the Parti Keadilan Rakyat (PKR) at Tropicana Square, Petaling Jaya where he made a statutory declaration ("SD1") setting out certain facts relating to the on-going murder trial of one Altantuya Shaaribuu ("Altantuya") to which he alleged he was privy to. The accused in the murder trial were Azilah Hadri, Sirul Azahar and Razak Baginda ("Razak"). At all material times, the deceased was a private investigator hired by Razak to provide protection services to Razak and his family. Razak and his family were purportedly harassed by Altantuya as she had apparently been promised certain commissions in respect of her involvement as a translator in a submarine deal between the Malaysian Defence Ministry and French manufacturers known as DCNS. Razak was involved in a company known as "Perimekar" which was set up to provide support services for the said

deal. It is alleged that through the deceased's own observation as well as told to him by Razak and Altantuya, he became aware of matters involving various personalities.

[14] The deceased decided to release the SD1 at the press conference on 3 July 2008 as he was purportedly concerned that the prosecution team in Altantuya's murder trial appeared to have been avoiding certain crucial evidence which the deceased had revealed to the police. On 4 July 2008 at about 11am, another press conference was called at Prince Hotel, Jalan Conlay, Kuala Lumpur where the deceased, represented by the ninth defendant, released another statutory declaration ("SD2") in which the deceased retracted the entire contents of SD1 on the grounds that he had been compelled to affirm SD1 under duress.

[15] It is alleged that arrangements were made by the eighth defendant to transport the deceased together with his family to Chennai through Singapore, Bangkok, Kathmandu, New Delhi and Madurai where the deceased and his family lived until his demise on 15 March 2013.

The Claim

[16] It is the plaintiffs' pleaded claim that the defendants had acted together in cohorts and/or individually in complicity with each other, unlawfully and/or by unlawful means and with malice, knowingly conspired and agreed to cause loss and damage to the deceased and the plaintiffs.

The Alleged Conspiracy As Pleaded In The Amended SOC

[17] In the amended SOC the plaintiffs have pleaded as follows:

The First And Second Defendants

[18] The first and second defendants had purportedly instructed the eighth defendant to resolve the problem occasioned by the release of SD1 by arranging a meeting with the deceased to organise a retraction of SD1 by a further statutory declaration to be signed by the deceased.

[19] It is alleged that the first and second defendants had met the eighth defendant at the official residence of the first defendant and instructed the eighth defendant to discuss with the deceased with regards to the retraction of SD1. It is pleaded that it included monetary compensation and threats to the safety of the deceased's family.

The Third Defendant

[20] Acting upon the request made by the first and second defendants, it is alleged that the third defendant had contacted the fifth defendant and instructed the preparation of the second statutory declaration retracting the contents of the SD1.

The Fourth Defendant

[21] It is alleged that the fourth defendant had advised the deceased, when they purportedly met together with the eighth defendant at the "Curve" complex located in Mutiara Damansara. The deceased was then advised by the fourth defendant to follow the instructions of the eighth defendant if he loved his family and cared for their safety.

The Fifth And Sixth Defendants

[22] The fifth defendant, with the assistance of the sixth defendant, had prepared the statutory declaration (SD2). The sixth defendant delivered the said SD2 to the lobby of the Hilton Hotel KL Sentral where the eighth defendant collected the SD2 and brought to the hotel room where the deceased was allegedly being held.

The Seventh Defendant

[23] On the purported instruction of the fifth and/or sixth defendant, the seventh defendant, a Commissioner for Oaths attended to the deceased at the hotel room where he was kept for the purposes of signing and affirming the SD2 as well as attesting the signature of the deceased in affirming the SD2, in the seventh defendant's official capacity as a Commissioner for Oaths.

The Eighth Defendant

[24] It is pleaded that the eighth defendant had acted upon the instructions and/or the request of the first and second defendants to meet with the deceased regarding the retraction of SD1. Subsequently the eighth defendant arranged for the deceased to meet the third defendant at a secluded section of the "Curve" shopping complex located in Mutiara Damansara. The deceased was allegedly brought to a room booked by the eighth defendant at the Hilton Hotel KL Sentral and was kept in the room in the presence of the eighth defendant and one ASP Suresh until the morning of 4 July 2008.

[25] The SD2 was delivered by the sixth defendant to the lobby of Hilton Hotel KL Sentral and was collected by the eighth defendant and brought to the room where the deceased was held. It is pleaded that the eighth defendant had asked the deceased to sign the SD2 without the deceased reading its contents.

[26] On 4 July 2008, the eighth defendant organised a press conference at Prince Hotel, Jalan Conlay, Kuala Lumpur for the purposes of releasing the SD2. The deceased was brought to the said hotel and the eighth defendant introduced him to the ninth defendant and informed that he had engaged the ninth defendant to represent the deceased as his lawyer at the press conference. The eighth defendant, through his secretary, arranged for the immediate renewals/applications for individual passports of the deceased's family.

[27] After the release of the SD2, on 4 July 2008 at about 1pm, the eighth defendant arranged for the deceased and his family to be transported to Singapore, Bangkok, Kathmandu, New Delhi and lastly Chennai where they lived until the demise of the deceased on 15 March 2013.

The Ninth Defendant

[28] The ninth defendant was said to have been engaged by the eighth defendant to represent the deceased at the press conference on 4 July 2008. The ninth defendant informed the reporters that the deceased was retracting his earlier SD1 which was allegedly done under duress and proceeded to hand out copies of SD2 to the reporters present.

[29] Particulars of unlawful acts and/or unlawful means:

(i) Causing SD2 to be drafted without the instructions of the deceased and further causing the deceased to sign the same under threat and inducement.

(ii) Causing or putting into effect the evacuation of the deceased and his family from Malaysia against their will.

(iii) Causing the deceased to be placed in a mentally disturbed state by threats made to the safety of his family.

(iv) Confining the deceased in a hotel room and forcing the affirmation of SD2 without the deceased being allowed the opportunity of reading the contents thereof beforehand.

(v) Depriving the deceased of access to legal advice and/or the presence of counsel before committing himself to signing SD2.

Particulars Of Loss, Expense And Damage

[30] The deceased was, prior to the 4 July 2008, a private investigator by profession with average monthly earnings of approximately RM15,000. The deceased was deprived of this earnings after being placed in exile in India by the eighth defendant on the instructions of the first and/or second defendants, from the 4 July 2008 until his demise on the 15 March 2013, a period of 56 months amounting to a total sum of RM840,000. The first plaintiff therefore claims this loss on behalf of the deceased's estate.

[31] Whist in exile in Chennai, India, the deceased and the plaintiffs incurred costs in securing rental accommodation as follows:

(i) Accommodation in an apartment at Madipakkam, Chennai at a total rental equivalent to RM162,000 for a period of 18 months.

(ii) Accommodation in an apartment at Uttra, Chennai at a total rental equivalent to RM90,000 for a further period of 18 months.

(iii) Accommodation in Rajakuppam at a total rental of RM42,000 for a further period of 21 months.

[32] The first plaintiff further claims special damages for the costs incurred in the schooling of the second, third and fourth plaintiffs at residential and international schools in Chennai due to the fact that the second, third and fourth plaintiffs are not Indian nationals and hence were deprived of the opportunity of attending local Indian schools, details of which are as follows:

(i) Between the years 2009 to 2011 the second and third plaintiffs attended an RMK residential schools at a total cost equivalent to RM60,000.

(ii) The fourth plaintiff attended the American International School from 2009-2010 at a cost equivalent to RM115,000.

(iii) The second, third, and fourth plaintiffs attended the RMK school in Thiruvarkadu from 2011 to 2013 at a total cost equivalent to RM140,000.

[33] The first plaintiff claims loss of income as a kindergarten teacher at RM3,000 per month from the 4 July 2008 and continuing. The first plaintiff claims all expenses associated with the maintenance of, and servicing of all loans on, the property owned by the deceased situated at No. 32, Jalan Pelangi 1, Taman Pelangi, Rawang, Selangor, the family home, for the period July 2008 to March 2013 at the sum of RM2,500 per month.

[34] The plaintiffs claims the sum of RM100,000 as the costs of transportation during their exile in Chennai and the cost incurred in air travel between India and Malaysia between the years 2008 to 2013, details of which shall be tendered at the trial of this suit.

[35] The plaintiffs further claims general damages for the mental trauma and anguish experienced by them individually caused by the actions of the defendants collectively, in depriving the plaintiffs of a home in familiar surroundings and instead being forced to live in a foreign country without the support of friends and relatives for the period July 2008 to March 2013 and the associated disruption in the education of the second, third and fourth plaintiffs.

[36] The plaintiffs' claim as follows:

(a) General and special damages;

(b) Interest on damages awarded at the rate of 5% per annum from the 4 July 2008 until realisation;

(c) Costs; and

(d) Such further and any other relief as this Honourable Court deems fit.

Decision

[37] The first to ninth defendants took umbrage at the plaintiffs' institution of this action and through their respective solicitors filed application to have this suit struck out. The defendants raised the issue of the

competency of the plaintiffs to maintain this suit against the defendants. I shall deal with this issue first.

Whether The Plaintiffs Are Competent Or Have *Locus Standi* To Commence Or Maintain This Suit Against The Defendants

[38] Order 6 r. 2(1)(b) Rules of Court 2012 (ROC) expressly provides that before a writ is issued it shall be endorsed where the plaintiff sues in a representative capacity with a statement of the capacity which he sues. The capacity must be stated in the endorsement.

[39] In *Meyappa Chetty v. Subramaniam Chetty* [1916] 1 AC 603, Lord Parker observed:

> It is quite clear that an executor derives his title and authority from the will of his testator and not from any grant of probate. The personal property of the testator, including all rights of action, vests in him upon the testator's death, and in consequence is that he can institute an action in the character of executor before he proves the will. He cannot, it is true, obtain a decree before probate, but because the production of probate is the only way in which, by the rules of the court, he is allowed to prove his title.

[40] An administrator derives his title or the right to act solely under the grant and cannot institute an action as administrator before the grant is given. In the case of *Ingall v. Moran* [1944] KB 160, *Creed v. Creed* was cited in the arguments, the status of an administrator in the period before a grant is taken out and after the grant is taken out was analysed. The plaintiffs in that case had issued a writ claiming to sue in a representative capacity as administrator of the estate of his son, who was killed in a motor accident, but he did not take out the letters of administration until nearly two months after the date of the writ. It was held by the Court of Appeal that the action was incompetent at the date of its inception by the issue of the writ, and that the doctrine of relation back of an administrator's title, on obtaining a grant of letters of administration, to the date of the intestate death could not be invoked so as to render the action competent. The vesting of rights in the estate only takes place when there is grant of letters of administration. No action may be commenced until the letters of administration are granted.

[41] The Federal Court in *Deraman & Ors v. Mek Yam* [1976] 1 LNS 20 Ali FJ made the following observation:

> Furthermore, the appellants have no legal title. They never had. They are only beneficiaries of the father's estate. The only person who could have legal title after their father's death would be the legal representatives of the estate. There was no evidence of any legal representatives having been appointed. On that ground also the appellants have no right to bring an action under section 10(1)(a) of the Ordinance. The action ought to have been dismissed as the appellants have no right or cause of action.

[42] In the instant case, the first plaintiff has expressly admitted in her affidavit in reply affirmed by the first plaintiff on 10 September 2014 (para. 8 encl. 37) that she has not been issued with the letter of administration. The first plaintiff also admits that she is neither the executor nor the adminstratrix of the deceased's estate. Learned counsel for the plaintiffs conceded that the letters of administration have not been issued at the time of commencement of this action against the defendants. However, learned counsel invited the court to consider the case of *Al Rashidy Kassim & Ors v. Rosman Roslan* [2007] 3 CLJ 361 where the Federal Court, relying on the Singaporean Court of Appeal's decision of *Wong Moy v. Soo Ah Choy* [1996] 3 SLR 398 had whittled down the strict rule expounded in the *Ingall's* case. The Federal Court in its judgment in *Al Rashidy* affirmed the exception to the rule as a matter of principle of law and then went on to apply that principle in the particular circumstances:

> Quite apart from that we also hold that the beneficiaries in the present case have at least an equity in the estate of the deceased to entitle them to seek a declaratory judgment. Thus, on the above grounds are agree with the learned counsel for the appellants that the appellants in this case had the *locus standi* to commence this action at least for the limited purpose of protecting and preserving the asset of the estate.
>
> In the present case the High Court found that the title to the said land was obtained by the respondent through fraud and declared that the transfer of the said land to the respondent was null and void. The Court ordered the respondent to transfer or cause to be transferred the said land to the appellants. The Court of Appeal agreed with the finding of the High Court that the respondent had obtained the title to the said land through fraudulent means but because of lack of *locus standi* ordered the said land to be retransferred to the respondent, but in the mean time ordered that a Registrar's Caveat be lodged against the said land pending disposal of the suit to be filed by the appellants.
>
> Now, in view of our finding that the appellants do have the *locus standi* to commence legal proceeding to protect and preserve the asset of the estate we hold that the appellants are entitled to the order as prayed for in prayer (c) of the claim. But as beneficiaries, we hold that the appellants are not entitled to claim for general and special damages on behalf of the estate; such a claim can only be made by the legal representative of the estate.

[43] In that case there was special circumstances necessitating intervention of the Federal Court by allowing declaratory orders to 'protect and preserve' the assets of the estate. In *Al Rashidy*'s case, the action was commenced by the beneficiaries of the estate in order to regain the said land from the respondent whom they alleged had by fraudulent means transferred the land to himself. The respondent had also entered upon the land and damaged the fruit trees and demolished buildings found on the said land. The land in question was also liable to be sold by the respondent to a third party. In *Al Rashidy* the appellants had to act fast in order to protect and preserve

the estate of the deceased and therefore there exist special circumstances for the beneficiaries to commence legal action against the respondent *qua* beneficiaries for the purpose of protecting and preserving the asset of the estate. In essence the Federal Court's decision was to preserve the *status quo* of the parties in question.

[44] In light of *Al Rashidy*'s case, the courts will not ordinarily grant *locus* unless it can be shown that it was necessary and expedient to protect and preserve the interest of the deceased's estate. The facts of the instant case before this court clearly does not possess the elements to attract the 'special circumstances' concept. Learned counsel for the plaintiffs submitted that this action had to be filed by the plaintiffs before the extraction of the letters of administration for the simple reason that the cause of action was due to expire on 2 July 2014 and it is submitted the expiry of the limitation is the special circumstances which entitled the plaintiffs to file this action to preserve and protect the deceased's estate arising from the possible award of damages.

[45] The purported cause of action arose from the time the deceased and his family were purportedly scuttled out of the country in 2008 until his return in 2013. The deceased could have filed this action earlier between 2008-2013 but for reasons only known to him chose not to. The first plaintiff only decided to file the action sometime in June of 2014. The Court of Appeal in *Dato' Ramesh Rajaratnam v. Datin Zaleha Abd Rahman & Ors* [2014] 5 CLJ 669 referred to the *Al Rashidy*'s case and said that:

> The test for administration proceeding for *locus standi* must be at least for the purpose of protection and preserving the estate's assets.

[46] Learned counsel for the plaintiffs submitted that since the cause of action was due to expire because of limitation it must be regarded as special circumstances. This court is of the considered view that to do so would be stretching and widening the principles of special circumstances expounded by the Federal Court in *Al Rashidy*. The fact that the cause of action would expire could not qualify it to be treated as a special circumstances as sanctioned by the Federal Court in its decision in *Al Rashidy*. It would be opening the floodgates for future litigants with similar circumstances of impending limitation. The Federal Court in its judgment in *Al Rashidy* affirmed the exception to the rule as a matter of principle of law and then went on to apply that principle in the particular circumstances. Arifin Zakaria FCJ (as he then was) in *Al Rashidy* said that:

> ... in deciding whether the appellants have the *locus standi* or not in instituting this action, it is necessary to determine what is the nature of the appellants' claim ...

[47] In his judgment Justice Arifin Zakaria referred to the judgment of Chao Hick Tin J in the Singaporean case of *Omar Ali Mohd & Ors v. Syed Jafaralsadeg Abdulkadir Alhadad & Ors* [1995] 3 SLR 388 and explained the rationale for such an exception in the following words:

A

> ... that the plaintiffs were not suing on behalf of the estate. They were suing in their own capacity as beneficiaries of the estate for a declaration to protect the property of the estate and to prevent the sale of the property to the fifth defendant from going through. This they had the *locus standi* to do as they had at least an equity in the estate of the intestate.

B **[48]** The threshold set by the Federal Court to qualify for special circumstances as follows:

> Now, in view of our finding that the appellants do have the *locus standi* to commence legal proceeding to protect and preserve the asset of the estate we hold that the appellants are entitled to the order as prayed for in prayer (c) of the claim. But as beneficiaries, we hold that the appellants are not entitled to claim for general and special damages on behalf of the estate; such a claim can only be made by the legal representative of the estate.

C

[49] The relief sought by the plaintiffs is for general damages which in my opinion would clearly not qualify to be treated as special circumstances. There are no special circumstances for any exception to be made on the facts of this case and nor was the relief sought by the plaintiffs in this action ie, 'declarations' to 'protect or preserve the assets' of the estate. It is abundantly clear that the first plaintiff does not have the capacity to initiate this action against all the defendants. The writ must be regarded as a nullity from the very beginning.

D

E

[50] Based on the above grounds I am of the considered view that the first plaintiff has no capacity to initiate this action against the defendants in the absence of a letter of administration. With regards to the second, third and fourth plaintiffs, the plaintiffs' pleaded case is not for a claim for loss of support pursuant to s. 7(1) of the Civil Law Act 1956. As this is not a claim for loss of support, the second to fourth plaintiffs do not have *locus standi* to maintain this action. Accordingly, based on the reasons mentioned above the plaintiffs' action against the first to ninth defendants is struck out by this court.

F

G

[51] Notwithstanding what I had stated above and for the sake of completeness, I would also address other issues raised by the first to ninth defendants as follows:

The Tort Of Conspiracy To Injure

H

[52] The main issue to be determined in all the applications before this court is whether the particulars on a claim of conspiracy in the amended SOC have sufficiently been pleaded, and whether the said claim is obviously unsustainable. To sustain a claim against the defendants for conspiracy the plaintiffs must plead the essential elements for a tort of conspiracy as follows:

I

(i) An agreement between two or more persons to act;

(ii) The agreement was for the purpose of injuring the plaintiffs;

(iii) There were overt acts that accompanied this agreement;

(iv) The act done in the execution of that agreement resulted in damage to the deceased; and

(v) The acts done were unlawful.

[53] In *Rookes v. Barnard* [1964] 1 All ER 367 at p. 397 Lord Devlin said:

> There are, as is well known, two sorts of conspiracies, the *Quinn v. Leathem* ([1901] AC 495...) type which employs only lawful means but aims at an unlawful end, and the type which employs unlawful means.

[54] In *Crofter Hand Woven Harris Tweed Co Ltd v. Veitch* [1942] AC 435 at p. 445 Viscount Simon LC said:

> It is enough to say that if there is more than one purpose actuating a combination, liability must depend on ascertaining the predominant purpose. If the predominant purpose is to damage another person and damages results, that is tortious conspiracy. If the predominant purpose is the lawful protection or promotion of any lawful interest of the combiners (no illegal means being employed), it is not a tortuous conspiracy, even though it cause damage.

[55] Therefore, for conspiracy to take place, there must be an unlawful object, or, if not in itself unlawful, it must be brought about by unlawful means. There must also be a co-existence of an agreement with an overt act causing damage to the plaintiffs. Hence, this tortious act is complete only if the agreement is carried into effect, thereby causing damage to the plaintiffs.

[56] The principle of pleading conspiracy has been illustrated and explained in *"Bullen & Leake & Jacob's Precedents of Pleadings*" 13th edn. at p. 221 states as follows,

> The gist of the tort of conspiracy is not the conspirational agreement to injure alone, but that agreement plus the over acts causing damage (*Marrinan v. Vibart* [1963] 1 Q.B. 234, affirmed [1963] 1 Q.B. 528). The statement of claim should describe who the several parties to the conspiracy are and their relationship with each other. It should allege the conspiracy between the defendants giving the best particulars it can of the dates when or dates between which the unlawful conspiracy was entered into or continued, and the intent to injure ... there is no call for a general plea of "acting wrongly and maliciously" (*Sorrell v. Smith* [1925] A.C. 700, at 714) nor is that sufficient. It should state precisely the objects and means of the alleged conspiracy to injure and the overt acts which are alleged to have been done by each of the alleged conspirators in pursuance of the conspiracy, and lastly, the injury and damage occasioned to the plaintiff thereby.

[57] In other words, to prove a conspiracy to injure, the plaintiffs must establish either a predominant purpose to injure the plaintiffs' business interest by lawful means. Justice Abdull Hamid Embong JCA (as he then was) in *Celcom (Malaysia) Bhd v. Mohd Shuaib Ishak* [2010] 7 CLJ 808, held at pp. 827-828:

A ... In short, the respondent has failed to raise a reasonable cause of action in either fraud or conspiracy. It is trite that for such allegations, specific particulars in relation to the alleged fraud or conspiracy must be pleaded. In *Gasing Heights Sdn Bhd v. Aloyah Abd Rahman* [1996] 3 CLJ 695, this principle was stated clearly in these words:

B > The second complaint against these six defendants was that, they had entered into a conspiracy with the fifth defendant to file the motion. However, apart from the bare assertion of conspiracy based on the joint filing of the action, no particulars of any kind were alleged against these six defendants to show how they were linked to the misdemeanours alleged against the fifth defendant.
C > Just as fraud must be pleaded with great particularity, so also all the constituent ingredients going to make up the conspiracy, must be pleaded. On this ground alone, the claim for conspiracy must fail.

[58] It is therefore incumbent on the plaintiffs to plead all the ingredients
D to make up a cause of action premised on conspiracy. In *Yap JH v. Tan Sri Loh Boon Siew & Ors* [1991] 3 CLJ 2960; [1991] 4 CLJ (Rep) 243, the court held that the constituent ingredients to make out a case of conspiracy are as follows:

(i) an agreement between two or more persons;

E

(ii) for the purpose of injuring the plaintiffs;

(iii) acts done in execution of that agreement resulted in damage to the plaintiffs; and

(iv) acts done in execution of that agreement must be without lawful
F justification or excuse.

[59] A perusal of the pleadings with scrutiny is necessary to ascertain whether the essential elements of conspiracy have been set out with clarity and precision in the SOC.

G *First And Second Defendants*

[60] The allegations pleaded against the first and second defendants for conspiracy are set out in the following paragraphs:

> 25. On or about the evening of the 3.7.2008, the 8th Defendant received
H a telephone call from the 2nd Defendant instructing the 8th Defendant to resolve the problem occasioned by the release of the deceased's SD1 that day and requesting the 8th Defendant to attend the official residence of the Deputy Prime Minister, Sri Satria, at Putrajaya to discuss the matter further that very evening.
>
> 26. The 8th Defendant duly complied with these instructions and
I attended the official residence of the 1st Defendant that evening where he met with both the 1st and 2nd Defendants. The 8th Defendant was informed by the 1st and 2nd Defendant that he (the 8th Defendant) was

to arrange a meeting with the deceased with a view to organize a retraction of SD1 by a further statutory declaration to be signed by the deceased.

27. Acting upon the request and/or instructions of the 1st and 2nd Defendants. the 8th Defendant arranged to meet the deceased at a restaurant in the town of Rawang, Selangor, at which discussions were entered into regarding a retraction of the deceased's SD1 which included offers of monetary compensation for doing so and threats to the safety of the deceased's family if this retraction was not entertained.

28. To further emphasise the seriousness of the 8th Defendant's request, made on behalf of the 1st and 2nd Defendants, the 8th Defendant arranged for the transportation of the deceased to a secluded section of the 'Curve complex', Mutiara Damansara, Petaling Jaya where the deceased was introduced to the 4th Defendant who advised the deceased, in no uncertain terms, that he was to follow the instructions of the 8th Defendant if he loved his family and cared for their safety.

30. In the meantime, the 3rd Defendant, upon the request made by the 1st and/or 2nd Defendants, contacted the 5th Defendant and instructed the preparation of a statutory declaration to be signed by the deceased in which a retraction of the contents of SD1 was to be made.

[61] The particulars of the unlawful acts and/or unlawful means common to all the defendants are as set out in para. 40 as follows:

40. Due to the cumulative circumstances aforementioned, the Plaintiffs aver and will aver that the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, and 9th Defendants acting individually and/or in concert and in complicity with each other, unlawfully conspired and agreed together to cause damage to the deceased and the Plaintiffs by unlawful acts and/or by unlawful means, particulars of which are as follows:

Particulars of Unlawful Acts and/or Unlawful Means

i. Causing SD2 to be drafted without the instructions of the deceased and further causing the deceased to sign the same under threat and inducement.

ii. Causing or putting into effect the evacuation of the deceased and his family from Malaysia against their will.

iii. Causing the deceased to be placed in a mentally disturbed state by threats made to the safety of his family.

iv. Confining the deceased in a hotel room and forcing the affirmation of SD2 without the deceased being allowed the opportunity of reading the contents thereof beforehand.

v. Depriving the deceased of access to legal advice and/or the presence of counsel before committing himself to signing SD2.

41. By reason of the matters aforesaid, the deceased had, and the Plaintiffs have, and continue to be, put to loss and expense and mental anguish as a result of the Defendants' conspiracy as pleaded above.

[62] It is the submission of learned counsel for the first and second defendants that the entire pleadings as particularised in the amended SOC do not consist of pleading of material facts constituting a cause of action against the first and second defendants. The plaintiffs have exhibited the list of documents intended to be adduced at the trial but it is the submission of learned counsel for the first and second defendants that affidavits cannot be used to make good the omission or defect in the amended SOC (Re: *Adib Mokhtar & Ors v. Jason Chan Chee Khong & Anor* [1999] 5 CLJ 555; [1999] 2 MLJ 473).

[63] It is further submitted that the plaintiffs have failed to plead sufficient particulars/facts in the amended SOC in relation to the agreement entered between the defendants to cause injury to the deceased, the acts done by the first and second defendants together with the other defendants to cause damage to the deceased.

[64] Learned counsel for the plaintiffs argued that the language used in the amended SOC is uncomplicated and direct to the point. The allegations made by the plaintiffs are supported by documents to show that there was a massive and concerted effort between all the defendants to ensure that the contents of the deceased's SD1 were completely retracted and substituted with the SD2. It is contended that once that was achieved the deceased had to be removed from the jurisdiction by threat and inducement. The documents show that there were intimate connections between the defendants and the roles each played in the purported conspiracy which is detailed in paras. 25 to 39 of the amended SOC. The particulars of the cumulative unlawful acts to which each participant contributed have been pleaded.

[65] The plaintiffs allege at para. 40 of the amended SOC that '... due to the cumulative circumstances aforementioned the plaintiffs aver and will aver that the D1-D9 acting individually and/or in concert and in complicity with each other, unlawfully conspired and agreed together to cause damage to the deceased'.

[66] The statements in the amended SOC, however, are mere general allegations. The plaintiffs failed to plead the material particulars as follows:

(i) That there was an agreement between two or more persons;

(ii) The agreement was for the purpose of injuring the deceased; and

(iii) The acts done in execution of the agreement which resulted in injuring the plaintiffs.

[67] The plaintiffs also failed to particularise with clarity as to the purported conspiracy pleaded:

(i) When was the agreement between the defendants devised or when did the defendants agree to collude with the predominant purpose to injure or to cause injury to the deceased;

(ii) What was the agreement and what was the intention of the agreement;

(iii) What were the purported overt acts of the defendants in pursuance of the agreement; and

(iv) How does the overt acts affected the deceased and resulted in injury to the deceased.

[68] In this case, there is neither a predominant intent on the part of all the defendants to injure the deceased and or to cause loss by unlawful mean.

[69] The failure of the plaintiffs to plead any agreement nor the particulars of the agreement, and failure to plead with clarity of the alleged overt acts of the first and second defendants in committing the alleged conspiracy in pursuance of their agreement proves fatal to the said allegation. The lack of particulars in the amended SOC as to the tort of conspiracy may prove difficult for the defendants to answer to the charge.

The Third Defendant

[70] Enclosure 21 is the third defendant's application to strike out the plaintiffs' amended writ of summons and amended statement of claim dated 23 June 2014 pursuant to O. 18 r. 19(1)(a), (b) and/or (d) of the ROC.

[71] The third defendant's involvement in the alleged conspiracy is found in para. 30 amended SOC:

> In the meantime, the 3rd Defendant, upon the request made by the 1st and 2nd Defendants, contacted the 5th Defendant and instructed the preparation of the statutory declaration to be signed by the deceased in which a retraction of the contents of SD1 was to be made.

[72] Learned counsel for the third defendant submitted that the plaintiffs did not plead any unlawful act committed by the third defendant. There is absolutely no link between that single pleaded act and the alleged damage, if any.

[73] The amended SOC did not plead that the contents of SD2 are untrue. In the particulars of the unlawful acts (re: para. 40) the plaintiffs have not expressly pleaded the third defendant's involvement in any of these unlawful acts. Furthermore, the alleged damage pleaded by the plaintiffs relates to the forced evacuation of the deceased and the plaintiffs from Malaysia. The Court of Appeal's case of *Renault SA v. Inokom Corporation Sdn Bhd & Anor and other applications* [2010] 5 CLJ 32; [2010] 5 MLJ 394 is relevant:

> In regard to the tort of conspiracy, the following need to be satisfied at this interlocutory stage:
>
> (a) an agreement between two or more persons (that is an agreement between Tan Chong and others);
>
> (b) an agreement for the purpose of injuring Inokom and Quasar;

A (c) that acts done in execution of that agreement resulted in damage to Inokom and Quasar;

(d) damage is an essential element and where damage is not pleaded the Statement of Claim may be struck out.

B **[74]** The very first element to be shown must be an agreement between two or more persons for the purpose of injuring the deceased. The agreement according to the Court of Appeal in *Renault SA*'s case is not limited to a signed and sealed agreement but any informal agreement, including a combination of efforts of the alleged co-conspirators. It must also be shown or at least alleged that acts were done in execution of that agreement which C resulted in damages.

[75] The lack of particulars in the amended SOC as to the tort of conspiracy against the third defendant may prove difficult for the third defendant to answer to the charge launched by the plaintiffs. The plaintiffs failed to plead the material particulars of the agreement and to plead with D clarity of the alleged overt acts of the third defendant in committing the alleged conspiracy in pursuance of their agreement. Based on the above grounds this is a suitable case to be disposed of by way of O. 18 r. 19 of the ROC.

E *The Fourth Defendant*

[76] The allegations pleaded against the fourth defendant for conspiracy are set out in para. 28 of the amended SOC that the fourth defendant advised the deceased, whom he met together with the eighth defendant at a secluded section of the "Curve complex", Mutiara Damansara, that he was to follow F the instructions of the eighth defendant if he loved his family and cared for their safety:

> To further emphasise the seriousness of the 8th Defendant's request, made on behalf of the 1st and 2nd Defendants, the 8th Defendant arranged for the transportation of the deceased to a secluded section of G the 'Curve complex', Mutiara Damansara, Petaling Jaya where the deceased was introduced to the 4th Defendant who advised the deceased, in no uncertain terms, that he was to follow the instructions of the 8th Defendant if he loved his family and cared for their safety.

[77] Learned counsel for the fourth defendant submitted that from the H pleaded case the plaintiffs seem to hinge on the safety of the deceased's family and that their lives were in jeopardy necessitating the family to leave Malaysia from 4 July 2008 until 2013. However, based on the documentary exhibit (Re: SSAM-1) the safety of the family was never an issue. The first and fourth plaintiffs did not live in India from 20 September 2008 until 2013 and have been living in Malaysia throughout that period. In fact the deceased I himself admitted coming back to Malaysia several times and the plaintiffs also admitted that they have also travelled to India to meet the deceased.

[78] It is also argued that the averments stated in the plaintiffs' affidavit contains facts and beliefs without stating the source. The matters deposed are clearly not within the personal knowledge of the first plaintiff as the person involved at all material times was the deceased. It is provided under O. 41 r. 5(1) of the ROC 2012 that affidavits must contain facts as the deponent is able of his own knowledge to prove. Hearsay evidence is inadmissible if the proceeding is a final judgment (Re: *AmInvestment Bank Berhad v. NEP Holdings (Malaysia) Berhad* [2013] 1 LNS 348; [2014] 8 MLJ 271; *Hua Joo Development Co Sdn Bhd v. Survey Development Service* [1994] 1 CLJ 73; [1994] MLJU 58).

[79] Based on the cases mentioned above the legal position is very clear. The affidavits must contain facts the deponent is able to prove based on her own knowledge. In the instant case the first plaintiff failed to disclose the source of information with regards to the statements made. I agree with the fourth defendant's contention that the facts in the first plaintiff's affidavit tantamount to merely hearsay and hence ought to be rejected by this court.

[80] Furthermore, the plaintiffs have failed to plead with clarity the particulars of the act of conspiracy as required by the law. The plaintiffs have not shown how the defendants had come together and/or the meeting of minds and a consensus between the conspiring parties to commit the unlawful act to cause injury to the deceased. The plaintiffs failed to plead the overt acts which were alleged to have been done by each and every conspirators in pursuance of the conspiracy including the injury and damage occasioned to the plaintiffs.

[81] For the reasons mentioned above the plaintiffs' amended SOC should be struck out.

The Fifth And Sixth Defendants

[82] It is pleaded in paras. 30, 31 and 32 of the SOC that the fifth defendant, with the assistance of the sixth defendant, prepared the statutory declaration (SD2). The sixth defendant then delivered the SD2 to the lobby of the Hilton Hotel KL Sentral where the eighth defendant collected the SD2 and brought to the hotel room where the deceased was being held. The fifth and/or sixth defendant had instructed the seventh defendant, a Commissioner for Oaths to attend to the deceased at the hotel room where he was kept for the purposes of signing and affirming the SD2.

[83] It is argued by learned counsel of the fifth and sixth defendants that even if it is assumed to be true that they drafted the SD2 that act is not unlawful. It did not damage the plaintiffs. The pleadings does not state that the SD2 was delivered by the fifth or sixth defendant to the deceased or that they had knowledge of the circumstances under which the deceased allegedly affirmed SD2. It is submitted that it is not pleaded that the fifth and sixth defendants had coerced or in any form or means forced the deceased to affirm such an SD.

[84] The plaintiffs failed to plead as follows:

(i) The object and means of the alleged conspiracy to injure;

(ii) The overt acts which are alleged to have been done by each of the alleged conspirators in pursuance of the conspiracy; and

(iii) The injury and damage occasioned by the plaintiffs. No damage is pleaded as to what was suffered by the plaintiffs as a consequence of the alleged conspiracy and the acts done by the fifth and sixth defendants.

[85] The unlawful acts allegedly carried out by the fifth and sixth defendants were not pleaded. Neither did the plaintiffs plead that the fifth and sixth defendants had coerced or in any form forced the deceased to affirm SD2.

[86] The plaintiffs, in particular the first plaintiff have no direct or actual knowledge of the matters deposed in the affidavit. The affidavit must contains facts that the deponent is able based on his own knowledge to prove.

The Seventh Defendant

[87] It is pleaded in para. 32, amended SOC that upon the instructions of the fifth and/or sixth defendant, the seventh defendant attended to the deceased at the room he was being held, for the purposes of attesting the signature of the deceased in affirming the SD2, in the seventh defendant's official capacity as a Commissioner for Oaths.

[88] A perusal of the plaintiffs' amended SOC would clearly show that the plaintiffs had failed to particularise the purported cause of action premised on the tort of conspiracy against the seventh defendant. The plaintiffs had merely made statements and general allegations of conspiracy without alluding to particulars.

[89] The plaintiffs' pleadings failed to state:

(i) The object and means of the alleged conspiracy to injure;

(ii) The overt acts which are alleged to have been done by each of the alleged conspirators in pursuance of the conspiracy; and

(iii) The injury and damage occasioned by the plaintiffs.

The Eighth Defendant

[90] It is pleaded that acting upon the instructions and/or the request of the first and second defendants, the eighth defendant met the deceased and entered into a discussion regarding the retraction of SD1 which included monetary compensation and threats to the safety of the deceased's family. The eighth defendant arranged for the transportation of the deceased to meet the third defendant at a secluded section of the "Curve" complex. Upon the meeting, the deceased was brought to a room booked by the eighth defendant at the Hilton Hotel KL Sentral and the deceased was kept in the room in the

presence of the eighth defendant and one ASP Suresh until the morning of 4 July 2008. The SD2 was delivered by the sixth defendant to the lobby of Hilton Hotel KL Sentral and was collected by the eighth defendant and brought to the room where the deceased was held.

[91] It is also pleaded that the eighth defendant had asked the deceased to sign the SD2 without the deceased reading its contents. On 4 July 2008, the eighth defendant organised a press conference at Prince Hotel, Jalan Conlay, Kuala Lumpur for the purposes of releasing the SD2. The deceased was brought to the said hotel and the eighth defendant introduced him to the ninth defendant and informed that he had engaged the ninth defendant to represent the deceased as his lawyer at the press conference.

[92] The eighth defendant, through his secretary, arranged for the immediate renewals/applications for individual passports of the deceased's family. Upon the release of SD2, on 4 July 2008 at about 1pm, the eighth defendant arranged for the deceased and his family to be transported to Singapore, Bangkok, Kathmandu, New Delhi and lastly Chennai where they lived in exile until the demise of the deceased on 15 March 2013.

[93] In the tortious act of conspiracy, there must be an agreement or combination of two or more with the common intention to effect an unlawful purpose or to do a lawful act by unlawful means which will result in damages to the plaintiff. Mohamed Dzaiddin J (as he then was) in *Yap JH v. Tan Sri Loh Boon Siew & Ors* [1991] 3 CLJ 2960; [1991] 4 CLJ (Rep) 243 referred to the case of *Lonrho Plc v. Fayed and Others* [1991] 3 All ER 303 where House of Lords affirmed that there are two types of conspiracies:

> ... (a) A and B combine to do an lawful act for an unlawful purpose which causes loss to a third party, C; and
>
> (b) A and B combine to do an unlawful act which causes loss to C... .

[94] Therefore for conspiracy to take place, there must be an unlawful object, or, if not in itself unlawful, it must be brought about by unlawful means. There must also be a co-existence of an agreement with an overt act causing damage to the plaintiffs. Hence, this tortious act is complete only if the agreement is carried into effect, thereby causing damage to the plaintiffs. The plaintiffs failed to plead the following:

(i) that there was an agreement between the eighth defendant and the other defendants;

(ii) for the purpose of injuring the plaintiffs; and

(iii) the execution of that agreement resulted in damages to the plaintiffs.

[95] Therefore, the bare allegation against the eighth defendant as pleaded is frivolous, vexatious and unsustainable.

The Ninth Defendant

[96] The ninth defendant was engaged by the eighth defendant to represent the deceased at the press conference on 4 July 2008. The ninth defendant informed the reporters that the deceased was retracting his earlier SD1 which was allegedly done under duress. The ninth defendant's role as pleaded was to hand out copies of SD2 to the reporters present at the press conference.

[97] The plaintiffs' cause of action against the ninth defendant premised on the tort of conspiracy to injure is entirely without any particulars. It is trite that a factual matrix to support the basic elements of such a tort must be pleaded in order that the plaintiffs may succeed in such a claim. I am satisfied in all these circumstances that the plaintiffs have no cause of action/s as pleaded against the ninth defendant.

[98] Having perused the plaintiffs' pleadings, it is observed that in so far as to all the defendants are concerned, the plaintiffs had failed to set out the essential elements of the tort of conspiracy allegedly to have been committed by these defendants, especially facts pertaining to acts done by these defendants in pursuance of the conspiracy charge levelled against them. It is essential that the plaintiffs set out the particulars of the tort of conspiracy failing which the plaintiffs could not sustain a cause of action premised on the tort of conspiracy.

[99] Due to the lack of particulars pertaining to the tort of conspiracy, it is impossible for the defendants to answer the charge of conspiracy against them by the plaintiffs. As the plaintiffs had clearly failed to plead the material facts that were necessary to disclose a reasonable cause of action, the allegation of conspiracy against the first to the ninth defendants is therefore frivolous and vexatious. It is trite that the plaintiffs must plead the essential requisite elements of the tort of conspiracy in its pleadings to enable the defendants to defend their cases in court.

[100] In the tort of conspiracy, there must be an agreement or 'combination' of two or more with the common intention to effect an unlawful purpose or to do a lawful act by unlawful means resulting in damages to the plaintiffs (*Industrial Concrete Products Bhd v. Concrete Engineering Products Bhd & Other Suits* [2001] 8 CLJ 262, *Mulcahy v. R* [1868] LR 3 HL 306 at p. 317 and *Belmont Finance v. Williams Furniture (No. 2)* [1980] 1 All ER 393 at p. 403).

[101] The allegations of conspiracy is regarded as serious and grave. The standard of proof is high and must commensurate with the severity of the charge. Allegation of such an act of conspiracy must be clearly pleaded and the overt acts must not be disjointed. Therefore, the bare allegation of conspiracy against the defendants as pleaded by the plaintiffs is clearly frivolous and vexatious.

The Law On Striking Out

[102] Justice Abdul Malik Ishak, J (as he then was) in *Pet Far Eastern (M) Sdn Bhd v. Tay Young Huat & Ors* [1999] 2 CLJ 886, stated the following at p. 914:

> Relying on all these authorities, it would be appropriate to say that a case should only be struck out if it is obviously unsustainable. The root word here is not "unsustainable" but rather "obviously" which denotes that on the face of it, the claim must be plainly or evidently unsustainable in law. In my judgment, these words cannot be read to mean that the court is to undertake, at this early stage, a detailed scrutiny of the documents and examine the evidence of each party to the dispute. To interpret it as such would be to go against the grain of the provisions of O. 18 r. 19(1) of the RHC. It is apparent that this order was designed specifically to weed out claims that are clearly unfounded and the rationale behind this Order has been described lucidly by Tan Sri Chang Min Tat, a former Judge of the Federal Court, in *Mallal's Supreme Court Practice*, 2ndedn, vol. 1 at page 219 as follows:
>
> > This rule enforces the rules of pleading. The court has the power (i) in a summary manner, ie, without trial, to stay or dismiss an action or enter judgment accordingly where the pleading discloses no reasonable cause of action or defence, or is scandalous, frivolous or vexatious as it prejudices, embarrasses or delays the fair trial of the action or it is otherwise an abuse of the process of the court. The rule applies as well to an originating summons and a petition, as if the originating summons and a petition were a pleading. But the rule also empowers the court to allow amendments of any pleading in addition to the powers under Order 20.

[103] The main objective of particulars in pleadings is to ensure that the overriding principle that the litigation between the parties, and particularly the trial, should be conducted fairly, openly and without any surprises. This objective is to inform the other side of the nature of the case that they have to meet, as distinguished from the manner in which that case is to be proved, to limit the generality of the allegations in the pleadings, or to define the issues which have to be tried and for which discovery is required. Each party is entitled to know the case that is intended to be made against him at the trial and have such particulars of his opponent's case as this will prevent him from being taken by surprise. However, the purpose of pleadings is not to play a game at the expense of the litigants. The particulars pleaded is to enable the other party to decide what evidence he ought to be prepared with and to prepare for the trial.

[104] The court is minded that the facts of this case perfectly fits the description of being "obviously unsustainable" due to the debilitating effect of the absence of *locus standi* of the plaintiffs. In *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7, the Supreme

A Court held that striking out application should only be allowed in 'obviously unsustainable' cases. As the plaintiffs have no *locus standi* to bring the action against the defendants, this is clearly a plain and obvious case to strike out. It is settled law that, in dealing with the applications under O. 18 r. 19 of the Rules of Court 2012, the court should consider and scrutinise the
B evidence in order to decide whether an action is bound to fail. When the case is argued on the affidavit evidence and if, it becomes plain and obvious that the case has no chance of success, the court can proceed to strike out the matter without having to go through a full blown trial.

[105] Based on what I have stated above, this court is of the view that this
C is a fit and proper case for striking out, taking into consideration of all the relevant principles as mentioned above. I had carefully considered the various affidavits filed herein and the submissions, both written and oral by the plaintiffs as well as all the defendants herein and the authorities tendered in support of their respective submissions.

D **[106]** Accordingly encls. 17, 19, 25, 29, 30 and 33 are allowed with cost and encls. 21 and 23 are also allowed but with no order as to cost. The writ and the amended SOC dated 23 June 2014 against all the defendants are hereby struck out.

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